IN THE

Supreme Court of the United States

October Term, 1941

No. .....

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MASSMAN CONSTRUCTION COMPANY, Petitioner and Appellee below.

vs.

HARRY W. BASSETT, Deputy Commissioner of the United States Employees' Compensation Commission; Myrtle Boling, Arline Boling, Deloris Boling and Bonnie Boling Williams, Respondents and Appellants below.

—o—

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION BELOW

The opinion of the United States Circuit Court of Appeals in this case has not been published and hence cannot be cited. It is set out in the transcript, pages 160 to 166. The opinion of the United States District Court is reported in 30 Federal Supplement 816.

II

JURISDICTION

The grounds on which the jurisdiction of this court are invoked are set out separately in the form required by this court's rule in the petition for certiorari, page 5, *supra*. For brevity they will not be repeated here.

III

STATEMENT OF FACTS

The facts are stated in sufficient detail in the petition, page 1, *supra*. For brevity a further statement here is omitted.

IV

SPECIFICATION OF ERRORS

1. The learned Circuit Court of Appeals erred in reversing the judgment and decree of the District Court on the ground that the said District Court was without jurisdiction.

2. The learned court below erred in holding that the requirement of Section 921 (b), Title 33, U. S. C. A., that suits brought thereunder "be instituted in the Federal District Court for the judicial district in which the injury occurred" was "not merely one of venue but . . . jurisdictional" (R. 164).

(3) The learned court below erred in holding that an objection based on the alleged institution of the suit in the wrong district was not waived by the failure of defendants to assert such objection by proper motion or answer in the trial court.

(4) The learned court below erred in holding that this case was brought in the wrong district (R. 160-161), it having been brought in the district where decedent died, but, as the appellate court found, not in the district where the accident which caused the death occurred.

(5) The learned Court of Appeals erred in holding that the District Court for the Eastern District of Missouri did not have jurisdiction concurrent with the federal district courts in Illinois over the entire Mississippi River.

(6) The learned court below erred in the construction of the State statute defining the boundaries of Ralls County,

Missouri (Sec. 13583, R. S. Mo. 1939) in that it failed to construe said section in the light of the act of admission (3 U. S. Stat. at Large 545) and the Constitution of Missouri (Art. I, Sec. 1).

(7) The learned court below erred in deciding the last mentioned question of State law in a manner not in accord with the applicable local decisions hereafter cited.

V

SUMMARY OF ARGUMENT

A

The Circuit Court of Appeals erroneously decided that the requirements of Section 921, Title 33, U. S. C. A., about the place of bringing a suit thereunder created conditions precedent to the trial court's subject-matter jurisdiction and that they were not mere venue requirements and hence could not be waived by the defendants. This construction of Section 921 raises an important question of Federal law not heretofore directly decided by this court but which ought to be settled by its decision. The decision below is, however, as to its basic premises in conflict with general rules of law laid down in prior controlling decisions of this court under different but analogous statutes and with decisions in other circuits under such analogous statutes.

B

The learned Circuit Court of Appeals erred in holding that under Section 921, *supra*, a suit to review a compensation award in a death case must be brought in the district where the accident causing death occurred. Section 921, read in the light of Section 902 (2), permits the bringing of such a suit in the district where the death occurred.

C

The learned Circuit Court of Appeals erroneously held that the place of the present accident (even though it were located east of the thalwig of the Mississippi) was outside the territorial jurisdiction of the District Court in Missouri, since that court had jurisdiction over the entire river concurrent with that of the distict courts in Illinois.

VI

ARGUMENT

A

Is the requirement of Section 921 (b), Title 33, in regard to the place of instituting suits thereunder, a venue requirement which may be waived by the parties or a requirement as to subject-matter jurisdiction which cannot be waived by them? The learned court below decided that it was the latter. In so doing it passed upon an important question of Federal law which has not been heretofore decided by this court but which should be settled by a decision of Your Honors. The importance of the question lies in the fact that a large number of cases under the Longshoremen's Act will be governed by the rule adopted in this connection.

While this court has not heretofore construed the section here involved, it has construed a number of other statutes, the language of which is similar to that used in Section 921 *supra*, and in so doing has laid down general principles of law with which we believe the present decision below conflicts.

The portion of Section 921 (b), with which we are here concerned, reads as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought

> by any party in interest against the deputy commissioner making the order, *and instituted in the Federal District Court for the judicial district in which the injury occurred.*" (Our italics.)

In holding that this requirement "is not merely one of venue but is jurisdictional," the court below cited no authority to sustain its position. In fact, the question has never heretofore been decided by a circuit court of appeals or by this court. The following decisions, under analogous statutes, are, we believe, controlling:

(1) Section 109, Title 28, U. S. C. A., regulates the place of bringing patent suits. The language of that provision is far stronger than that of Section 921, Title 33:

> "The District Courts shall have jurisdiction . . . in the districts, etc."

Yet this court has expressly held that the requirement of Section 109, Title 28, is one of venue only and that it may be waived by the entrance of a general appearance. *General Electric Company* v. *Marvel Rare Metals Company*, 287 U. S. 430. An attempt may be made to distinguish this case from the case at bar by saying that Federal district courts as a class are given jurisdiction in patent suits under Section 41 of Title 28, and that the provisions of Section 109 of that title cannot therefore be taken as a grant of jurisdiction and so must relate to venue only. But Section 41 of Title 28 also gives to district courts, as a class, jurisdiction over cases arising under the constitution and laws of the United States and involving more than three thousand dollars. The present case and cases like it arise under the constitution and law of the Federal government and this case involves in excess of three thousand dollars. Had Section 921 of Title 33 not been enacted the Federal courts would certainly have had jurisdiction to enjoin or prohibit an attempted action of the Em-

ployees' Compensation Commission which was beyond the powers of said body as defined in the act creating it.

(2) Similar language is contained in Section 10 of Title 6, U. S. C. A., with respect to actions brought against surety companies on bonds required by Federal law. While this section has not been construed by this court, it has been interpreted in other Federal circuits as a requirement of venue and not a jurisdictional one. *United States ex rel Phoenix Iron Company* v. *California Bridge Company*, 152 Fed. 559.

(3) Perhaps a stronger analogy is found in the decisions under the *Jones Act*, in particular Section 688 of Title 46. Both the Jones Act and the Longshoremen's Act were enacted in the exercise of Federal admiralty power and both created new rights not theretofore existing under the general law of the sea and provided specific remedies for the enforcements of those rights. Section 688, *supra*, provides:

> "Jurisdiction in such actions shall be under the court of the district where the defendant employer resides."

Note that this is a part of the section which creates the right and defines the remedy. But this court has expressly held that the requirement therein as to the place of bringing suit is one of venue only and may be waived by a general appearance of the defendant. *Panama Railroad Company* v. *Johnson*, 264 U. S. 375.

(4) The language of the Anti-Trust Act (Sec. 22, Title 15) is somewhat different but presents an analogy to the present situation. Its requirement that suits brought thereunder be instituted in a certain district has been expressly held by this court to create a venue requirement only. *General Investment Company* v. *Lake Shore Railway Company*, 260 U. S. 261.

(5) The provisions of the Tucker Act, now contained

in Sub-Section 20, Section 41, Title 28, originally required that suits against the United States, brought thereunder, be commenced "in the district where the plaintiff resides" (24 Statutes at Large 506). But it was expressly held by this court in *United States* v. *Hvoslef*, 237 U. S. 1, that this requirement could be waived by a failure of timely objection on the part of the government.

(6) The general principles governing the distinction between requirements having to do with subject-matter jurisdiction which cannot be waived and those having to do with venue which can be waived have been often announced by this court and by the lower Federal courts as well as by those of the several states. These decisions are well summarized in Section 501, Elliott on *Appellate Procedure*, as follows:

> "This is the key to the situation. The principle that there is jurisdiction of a class and also jurisdiction of a particular subject matter is a reasonable one and is recognized in logical treatises. An objection that there is no jurisdiction of the subject—that is, of the general class—reaches the competency of the court and may be made at any time, since, if the court is not competent to entertain authority over the class, it is, as to that class, as if there were no court. As an illustration of a case where a court is incompetent because of want of authority may be taken the instance of a justice of the peace assuming to exercise jurisdiction in a case of purely equitable cognizance. In such a case it is proper to hold that the question of jurisdiction may be made in the first instance in the appellate tribunal. As a case illustrating the rule that where there is general authority over the subject no objection of a jurisdictional character, not in some mode presented to the trial court, may be taken, is that of a party liable to an action in the county where the wrong was committed voluntarily and without objection submitting it to a trial in a different county."

The above language is quoted with approval in the case of

Albuquerque etc. Coal Company v. *Lermuseaux* (Sup. Ct. of New Mexico), 187 Pac. 560, l. c. 562. Where, for example, a case is one in admiralty, of which the district courts in general have jurisdiction it is held that an objection based upon the fact that the case is brought in the wrong district must be made at the first opportunity or else forever waived. *St. Paul etc. Insurance Co.* v. *the Lake Superior*, 21 Fed. Cases, No. 12,240; *The Wilamette*, 70 Fed. 874; *Kauglig* v. *United States*, 19 Fed. (2d) 74. So also cases which, because of diversity of citizenship or because a federal law is involved, fall within the general class of which district courts as a class exercise jurisdiction may be tried in any district court if the parties thereto consent, and a failure to object on the ground that the case is brought in the wrong district is a waiver of such objection. *McCormick Co.* v. *Walthers*, 134 U. S. 41; *Commercial Insurance Co.* v. *Consolidated Trust Co.*, 278 U. S. 177; *In re Moore*, 209 U. S. 490; *Thames and Mercey Insurance Co.* v. *United States*, 237 U. S. 19; *Central Trust Co.* v. *McGeorge*, 151 U. S. 129; *Martin* v. *B. & O. R.*, 151 U. S. 673. Two decisions of the Circuit Court of Appeals for the Eighth Circuit are, in this connection, of great importance, since they lay down principles directly at variance with the decision of that court in this case. They are *United States* v. *Edwards*, 73 Fed. (2d) 477, l. c. 479 and *United States* v. *Kiles*, 70 Fed. (2d) 880, l. c. 881. Those cases were suits upon policies of war risk insurance. Plaintiff's petition in each instance failed to state that any disagreement had been had between the beneficiary and the government. The Court of Appeals held that the presence of such disagreement was jurisdictional, but that it went solely to jurisdiction over the subject-matter of the particular case and not to jurisdiction over the subject-matter of the class of cases to which it belonged, and hence was waived by the government's failure to object in the trial court to the fact that plaintiff had not shown it.

It is submitted that because the present class of cases arises under the constitution and laws of the United States and because of the general language of Section 921 (b), district courts in general are given jurisdiction over the class of such cases, and hence an objection to the jurisdiction of the court over a particular case, based upon the fact that it is brought in the wrong district, is waived by the failure of the defendants to assert it in the district court.

We have not found any case in this court or in the lower federal courts where a direction contained in a statute that cases be brought in a certain district has been held to relate to subject-matter jurisdiction. All such statutory directions have been held to relate to venue only. Seeming exceptions to the rule found in land title cases and criminal cases are based upon historical reasons growing out of the original function of the jury as a group of witnesses and set these cases aside from those of a transitory nature. The requirement that a transitory case be brought in a certain county or district has been universally held to be subject to waiver. Workmen's Compensation proceedings and court suits to review compensation awards are universally held to be transitory. *Chambers* v. *Sanford & Treadway*, (Tenn. Sup.) 289 S. W. 533; *Ocean Accident & Guaranty Co.* v. *Martin*, (Ga. App.), 134 S. E. 174; *Albuquerque etc. Coal Co.* v. *Lermuseaux*, (New Mexico Supreme) 187 Pac. 560; *Industrial Commission* v. *Murphy*, 41 Oh. App. 206, 180 N. E. 731.

The last two cited cases are particularly important because they involve states of fact identical with those in the case at bar and were brought under Workmen's Compensation statutes, the wording of which is very similar to Section 921. In both cases the state courts decided that the venue requirement could be and were waived. The Albuquerque case is largely based on Federal authorities. The following quotations are typical:

Motoshaver, Inc. v. Schick Dry Shaver Co. (CCA 9th Ct.) 100 Fed. (2d) 236, 237, "Every court has jurisdiction of the subject matter of patent infringement, and, if the defendant appear generally the court has the power to adjudicate the charges against him."

Industrial Commission v. Murphy, *supra*, "all courts of common pleas have jurisdiction to review on appeals the awards of the Industrial Commission. The venue of a particular appeal is the county in which the injury occurred. The Industrial Commission made no timely objection to the trial of the case in the county of Athens, rather than in Hocking County, and by pleading to the merits of the case waived its right to subsequently raise that question."

B

Meaning of the term "injury" in Section 921.

The Court of Appeals decided that the accident which brought about Boling's death occurred east of the thalwig of the Mississippi River as it "existed both before any construction work on the river and also at the time of injury." The Court did not decide where the river channel was in 1910 at the time the boundaries of the Eastern District of Missouri were established by statute, and indeed there was no evidence from which such a finding could be made. But, assuming that the accident did happen east of the center line of the channel, we are brought to the consideration of the next premise in the Court of Appeals' argument, to-wit: that the place of injury mentioned in Section 921 is in all cases the place of the accident. This proposition ignores the statutory definition of the word "injury" contained in Section 902 (2) of the Act. The construction of these two sections together presents a question of Federal law not heretofore decided by this Court, but which should be so decided. The Court will note that the point here made was not raised in the original motion for rehearing but was raised in certain additional suggestions in support thereof filed by this petitioner with leave

of the Court of Appeals. Section 902, Title 33, U. S. C. A., reads as follows:

> "When used in this Act the term 'injury' means accidental injury *or death* arising out of and in the course of employment." (our italics)

An examination of the Congressional Record discloses that as this bill was originally introduced and as it passed the senate the words "or death" were not included in the definition (S. B. 3170, 67 Congr. Rec. 10,608, June 3, 1926). The bill was re-written by the House Judiciary Committee, and as so re-written passed the House (68 Congr. Rec. 5404), and at that time the words "or death" were inserted in the definition. It is thus clear that these words were placed in the definition not through inadvertence but with deliberate intent. This Court has said that where a legislative body in passing an act expressly defines a term as used therein, the courts will be bound to accept the definition so given. *Fox* v. *Standard Oil Co.*, 294 U. S. 87, l. c. 96. See also *Emery Bird Thayer Dry Goods Co.* v. *Williams*, 98 Fed. (2d) 166; *In re Kohler*, 79 Cal. 313, 21 Pac. 758.

It is submitted, therefore, that in the light of the mandatory definition contained in Section 902, the word "injury" used in Section 921 (b) must be read "injury or death."

This construction is borne out by the fact that the cause of action granted to the dependents of the deceased employee is separate and distinct from the cause of action which the employee might have had had he lived and that the operative fact creating their right of action is the death of the employee. *International Mercantile Marine Co. v. Lowe*, 93 Fed. (2d) 663; *Norton* v. *Traveler's Insurance Co.* (C. C. A. 3rd) 105 Fed. (2d) 122, 123, 124. In this connection note the care with which Congress has distinguished the two causes of action, particularly in Section 913 of the act.

C

CONCURRENT JURISDICTION

The Court of Appeals correctly held that the boundaries of the territorial jurisdiction of the Eastern District of Missouri are in the first instance governed by Federal law (R. 165). Section 171 of Title 28 U. S. C. A. defines the boundaries of this district as including "the territory embraced on the date last mentioned (July 1, 1910) in the counties of ...Ralls...." We must, however, look to the state statutes of Missouri to find what territory was embraced in the county of Ralls on July 1, 1910. The applicable statute is that cited by the Circuit Court of Appeals, to-wit: Section 13, 583 R. S. Mo. 1939 (Sec. 11, 924, R. S. Mo. 1929). It is true that this act defines the eastern boundary of Ralls County as the "middle of the main channel" of the Mississippi River. However, this statute must be red in connection with the constitution of the state as it existed when the statute was enacted and still exists. When the states of Missouri and Illinois were admitted to the union Congress provided in the two enabling acts that they should have concurrent jurisdiction over the entire Mississippi River. (3 Stat. at Large, 429, 3 Stat. at Large 545). Acting under this congressional grant of authority our first constitutional convention inserted similar words in the Constitution of 1820 (Art. 10, Sec. 2). This provision was carried forward in the Constitution of 1865 (Art. 11, Sec. 2) and in the present Constitution of 1875 (Art. 1, Sec. 1). Section 13,583 R. S. Mo. 1939 (Sec. 11924 R. S. Mo. 1929) must therefore be read in connection with the constitution and when Congress said that the territory embraced in the County of Ralls should be placed in the Eastern District of Missouri, it included all of the applicable state laws defining the boundaries of that county, the constitution as well as the statute, and therefore it included the provision that the county as a political subdivision of the State should have concurrent jurisdiction

over the entire river. Such is the interpretation of the law of this State laid down in the decisions of its highest court. *State* v. *Kurtz*, 317 Mo. 380, 295 S. W. 747; *Sanders* v. *Anchor Line*, 97 Mo. 26; *Swearingen* v. *Steamboat Lynx*, 13 Mo. 519.

It is submitted that the question of whether or not the Federal District Courts in this State have jurisdiction over the entire Mississippi River concurrent with the District Courts in Illinois is of vital general importance and should be decided by this court. Should not the Federal District Court within which Ralls County, Missouri is situated have and exercise the same territorial jurisdiction as that exercised by the Ralls County State Circuit Court? The Mississippi River is quite unlike other rivers in this country in that the boundaries of its channel are constantly changing.* To determine exactly where the center line was on July 1, 1910, is an absolute impossibility. Unless the concurrent jurisdiction provision be applied, it will be almost impossible for the Federal Courts, sitting in admiralty, to determine whether or not any maritime accident happened in the Eastern District of Missouri or in Illinois. Practical considerations should therefore weight strongly in favor of the construction for which we here contend.

D

As the decision of the Circuit Court of Appeals was based solely upon the jurisdictional questions involved we have for brevity not briefed the merits of the case. This Court will, no doubt, be concerned somewhat with the matter of the merits. While not at this time briefing the question thus raised at length, we deem it sufficient to refer to the excellent opinion

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* Footnote. This geographical fact may be judicially noticed by the Court: *Radford* v. *Wood*, 83 Neb. 775, 120 N. W. 58; *Drainage Dist.* v. *Exchange Trust Co.*, 175 Ark. 939; *McCall* v. *North Pine Bluff Realty Co.* (Ark.) 185 S. W. 1178.

written by Judge Charles B. Davis in the District Court and cited above. (30 Fed. Sup. 816).

E

CONCLUSION

For the reasons stated above we believe that the present case presents certain novel and highly important questions of federal law and that the general public interest demands that these questions be set at rest by a final word spoken by this Court.

Respectfully submitted,

BEN ELY,
Attorney for Petitioner.